91-1529 (1)

91-1529

Supreme Court, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

DWAYNE EDWARD POLIDORI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

DOES IT CONSTITUTE AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE POLICE, IN EXECUTING A VALID SEARCH WARRANT, FAIL TO DELAY ENTRY INTO A DWELLING FOR A SUFFICIENT TIME AFTER ANNOUNCING THEIR PRESENCE AND PURPOSE TO GIVE A PERSON IN THE ROOM FARTHEST FROM THE DOOR TIME TO ANSWER?

IF SO, DOES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE A STATE COURT TO EXCLUDE EVIDENCE OBTAINED UNDER A VALID SEARCH WARRANT, BECAUSE THE POLICE WAITED AN INSUFFICIENT PERIOD OF TIME BEFORE FORCING ENTRY ONTO THE PREMISES?

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

STATE OF MICHIGAN,

Petitioner,

vs.

DWAYNE EDWARD POLIDORI,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN**

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in this cause on August 19, 1991, leave to appeal denied by the Michigan Supreme Court on January 22, 1992.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 190 Mich App 673; ___ NW2d ___ (1991), and appended below as Appendix A; the order of the Michigan Supreme Court denying Respondent leave to appeal is unreported as yet, and appended below as Appendix B; the opinion of the trial court is unreported, and appended below as Appendix C.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its opinion on August 19, 1991. The Michigan Supreme Court denied leave to appeal on January 22, 1992. This Court's jurisdiction is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Following his bindover on charges of possessing more than 50 grams of cocaine with intent to deliver, Respondent filed a pretrial motion to suppress evidence seized from his home during the execution of a search warrant. On July 12, 1990, July 24, 1990, and August 3, 1990, the trial court conducted an evidentiary hearing into the allegations. Testimony at the hearing disclosed that on November 9, 1989, at about 7:00 pm, plain clothes police officers arrived at Respondent's home in an unmarked van, and armed with rifles. Within three-to-six seconds after announcing their presence and purpose, the officers forced entry into Respondent's home with a battering ram.

On August 23, 1990, following the conclusion of the hearing, the trial court issued a written opinion, holding that the police had violated the "knock and announce" provisions of MCL 780.656; MSA 28.1259(6) by failing to wait a sufficient period of time

before forcing entry into Respondent's residence. See Appendix C. The court found that, absent circumstances jeopardizing the evidence to be seized, waiting no more than three to six seconds after announcing their presence and purpose did not constitute substantial compliance with the state statute. However, the court continued to hold that, because the statute provided a specific remedy for noncompliance, it would be inappropriate to impose an exclusionary remedy, and denied the motion to suppress. The court entered a stay of proceedings on September 7, 1990, pending the outcome of further litigation on the point, and certified the matter as a controlling question of law; on November 19, 1990, the Michigan Court of Appeals granted Respondent's application for leave to appeal.

On August 19, 1991, the Court of Appeals reversed the trial court's holding in a published opinion, holding that the police violation of the statute constituted an unreasonable search and seizure under the

Fourth Amendment, that the existence of a separate remedy did not preclude application of the exclusionary rule, and that exclusion was the appropriate remedy under the Fourth Amendment. See Appendix A. On January 22, 1992, the Michigan Supreme Court denied Petitioner's application for leave to appeal. See Appendix B.

Petitioner now seeks certiorari.

REASONS FOR GRANTING THE WRIT

The sole issue presented in this appeal is whether Michigan has misconstrued the scope of the Fourth Amendment's exclusionary rule, in imposing an exclusionary remedy for violation of a state procedural statute.[1]

In this case, the trial judge found that a delay of three to six seconds was insufficient to comply with the directives of the statute; but given the unquestionable validity of the warrant, he found no violation of the Constitution. Moreover, the judge determined that the availability of other remedies -- specifically a penal sanction, directed against the offending officer[2] -- sufficed to vindicate the

---

[1] For purposes of this Petition, Petitioner concedes that the police violated the applicable provisions of the state statute. In any event, the correctness of the finding that waiting three to six seconds was not substantial compliance with the statute presents no federal issue.

[2] Petitioner also notes the existence of civil remedies under 28 USC 1983, for alleged violations of

Legislature's mandate, and that no further public purpose would be served by suppressing the evidence. The exclusion of evidence is not, after all, a personal constitutional right of the party aggrieved, but rather "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v Calandra, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974). And, as this Court has noted:

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most

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2 Continued
the Fourth Amendment, and under state tort law, for an unjustified trespass onto property. See, eg, Bivens v Six Unknown Agents, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971).

Given the availability of these remedies to compensate citizens for an unreasonable entry, Petitioner submits that there is no apparent justification for excluding evidence seized under a valid search warrant.

efficaciously served." Calandra, supra at 348.

Where a magistrate has determined the existence of probable cause, an intrusion into a home under authority of a judicial warrant affords a citizen ample protection from arbitrary and unreasonable official conduct.[3] Given the availability of other

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[3] Thus, the statute does not protect the privacy interests of citizens; that is the interest served by the warrant, and by the Fourth Amendment. The statute, on the other hand, is intended to protect the safety and property of the parties involved -- and Plaintiff submits that it makes no sense at all for the Law to impose the same remedy for an unauthorized and unwarranted intrusion that it does for an approved intrusion which the police somehow manage to muddle. Viewed in this light, the statute reflects the Legislature's attempt to balance the citizen's need for civilized law enforcement officers with the Law's need for reasonable expedition. It does not, so far as Plaintiff can discern, seek to punish the public by granting gratuitous boons to criminals in order to deter police bungling.

Or, put another way, the statute seeks to protect both officer and citizen from physical harm, and the citizens' property from needless damage. But, with due respect to the state courts, the Constitution does not grant each citizen the sacred right to rush to the nearest toilet to begin dispensing with the evidence.

remedies -- both civil and criminal -- which, unlike the clumsiness of the exclusionary rule, do not require courts to excuse the lawlessness of one citizen to condemn the misbehavior of another, there is no valid public purpose served by excluding the evidence merely because a police officer prematurely forces an entry which he was legally entitled to make. Under these circumstances, the seizure is the fruit of a valid search, not of the improper manner of effecting the search; and the remedy should not extend to harming the public by insulating a criminal from the consequences of his own acts.

In New York v Harris, 495 US ___; 110 S Ct ___; 109 L Ed 2d 13 (1990), this Court reached a similar result in the context of confessions, holding that an unlawful entry into the home did not render inadmissible a subsequent confession, so long as the arrest itself was based upon proper probable cause. Because the arrest itself was perfectly valid, the Court reasoned, the technical

invalidity in the manner of entry into the dwelling did not render the arrest unlawful, and did not require the suppression of the ensuing confession. Applying the rule of Harris to this case should lead to the same result: as a magistrate authorized the search upon a finding of probable cause, the intrusion into the home was perfectly valid, and suppression would serve no useful purpose under the Constitution; and as the State may protect its interest in the orderly administration of Justice through any number of other means -- penal or civil sanctions against the offending officers, for example -- nothing in the Constitution requires the suppression of evidence seized under authority of the warrant. Moreover, the warrant provided a valid source for the evidence independent of the method of entry, Segura v United States, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984), making its discovery inevitable as a matter of law. Cf, Nix v Williams, 467 US 431; 104 S ct 2501; 81 L Ed 2d 377 (1984).

Ignoring application of the rationale behind the Harris rule, most jurisdictions appear to presume that the violation of a state notice statute when executing a valid search warrant will require the suppression of any evidence seized under the warrant. See, eg, People v Gonzalez, 211 Cal App 3d 1043; 29 Cal Rptr 846 (1989); State v Tweed, 62 Or App 711; 663 P2d 38 (1985); Tatman v State, 320 A2d 750 (Del, 1974); State v Carfuel, 112 RI 644; 314 A2d 144 (1974); People v Marinez, 160 Ill App 3d 349; 513 NE2d 607 (1987); People v Fox, 691 P2d 349 (Colo App, 1984); Sandland v State, 636 P2d 1196 (Alaska, 1981); State v Bates, 587 P2d 747 (Ariz, 1978). Among the jurisdictions surveyed, while all appear to authorize "no knock" entries to varying degrees, see, eg, People v Mahoney, 462 NYS 410; 8 NY2d 47; 448 NE2d 1321 (1983), only North Carolina appears willing to look beyond an officer's technical violation of a "knock and announce" statute, to assess the overall reasonableness of a search under the

Fourth Amendment. See, State v Willis, 8 NC App 617; 294 SE2d 330 (1982) affd 307 NC 461; 298 SE2d 388 (1983). But no jurisdictions appear willing, without the express authority of this Court, to recognize a distinction in the application of the Exclusionary Rule between a warrantless search and entry, and a premature entry to effect a search under warrant This is all the more surprising in light of the fact that this Court has already indicated the inapplicability of an exclusionary sanction under circumstances presenting a far greater risk for both citizen and officer: an entirely warrantless entry onto the premises, followed by an officer's tardy application to the court for a warrant. Segura, supra. It is, after all, an unconscionable misapplication of the Law for courts to reject evidence stemming from a premature entry to execute a warrant, when they would have accepted the evidence, had the officers simply entered without authority -- and then proceeded to apply for the warrant. But that is the net effect of

the lower courts' widespread misapplication of the Exclusionary Rule under circumstances similar to the case at bar.

This widespread misunderstanding of the difference between a constitutional seizure, and an improper entry to effect the seizure appears to result in substantial numbers of cases in which truth is a casualty, for no apparent reason. In view of this Court's responsibility for rewriting the rules of search and seizure in the wake of Mapp v Ohio, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961),[4] this Court would be doing a large service to the people of this country by restraining application of the Constitutional rules of search and seizure to cases where a search or seizure is actually unconstitutional, and returning to the States the responsibility for overseeing the manner in which constitutional searches are conducted.

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[4] Petitioner notes that the Michigan Court of Appeals apparently

Accordingly, this Court should affirm the decision of the trial court, reverse the Court of Appeals, and remand the cause for trial.

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4 Cont'd
relied upon this Court's holding in Mapp to justify applying the exclusionary rule under the facts of this case. See infra, p ___a.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for trial.

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Dated: February 25, 1992
JC/jlh

APPENDICES

APPENDIX "A"

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, Aug.19, 1991
9:25 am
No: 133018

DWAYNE EDWARD POLIDORI,

Defendant-Appellant.

Before: Cavanagh, P.J., and Neff and W.R. Beasley, *JJ.

CAVANAGH, J.

Defendant is awaiting trial on the charge of possessing with the intent to deliver a controlled substances in an amount of 50 grams or more but less than 225 grams, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), pending our disposition of the present appeal. Defendant claims that the trial court erred in deciding that suppression was not the appropriate remedy for a violation of Michigan's knock-and-announce statute, MCL 780.656; MSA 28.1259(6). We agree with defendant and reverse the decision made below.

According to the evidence submitted at the suppression hearing, police officers obtained a search warrant for defendant's home after successfully completing a controlled "buy". On November 9, 1989, at approximately 7:00 p.m., four to five police officers in plainclothes armed with rifles arrived in an unmarked van at defendant's home. Within six seconds of knocking and announcing their presence, the police officers forced their way in with a battering ram.

Defendant moved for suppression of the evidence seized in his home arguing that the police officers did not allow a reasonable time for the occupants to answer the door. Relying on People v Harvey, 38 Mich App 39, 195 NW2d 773 (9172) and People v Doane, 33 Mich 579; 190 NW2d 259 (1971), rev'd 387 Mich 608; 192 NW2d 292, defendant

insisted that to comply with the statute, the police officers had to knock, announce their presence and purpose, and wait long enough for the occupants to reach the door from the room farthest away.

In deciding defendant's motion, the trial court agreed that the knock-and-announce statute had been violated by the conduct of the police officers because, absent any exigent circumstances, forced entry after a three to six second wait did not substantially comply with the statute. However, the trial court also ruled that "the search and seizure was not constitutionally invalid but rather was merely statutorily illegal." Consequently, the trial court refused to apply the exclusionary rule.

The trial court further relied on the fact that the statute provided its own remedy for an officer who

wilfully exceeds his authority. See MCL 780.657; MSA 28.1259(7). The court concluded that the deterrent aim of the exclusionary rule would not be properly served because there was a statutory remedy available if the officers wilfully violated the statute. It is with the trial court's ruling with respect to the application of the exclusionary rule that we disagree.

US Const, AM IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The constitution does not forbid all searches and seizures, only unreasonable ones. Harris v United States, 331 US 145, 150; 67 S Ct 1098; 91 L Ed 1399 (1947). Consequently, the lawfulness of a search of seizure will

depend upon its reasonableness. Ker v California, 374 US 23, 32; 83 S Ct 1623; 10 L Ed 2d 726 (1963); People v Orlando, 305 Mich 686, 690; 9 NW2d 893 (1943). Because there is no formula for the determination of reasonableness, each case must be decided on its own facts. Go-Bart Importing Co v United States, 282 US 344, 357; 51 S Ct 153; 75 L Ed 374 (1931).

MCL 780.656; MSA 28.1259(6) provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

Although there is no Michigan case that directly deals with the sanction that should follow a violation of the knock-and-announce statute, we agree with a number of other jurisdictions that the

requirement that officers identify themselves and stated their authority and purpose before entering a private residence has is roots in the Fourth Amendment. See People v Gonzalez 211 Cal App 3d 1043; 259 Cal Rptr 846, 848 (1989), Tatman v State, 320 A2d 750, 751 (Del 1974), Commonwealth v Chambers, 385 Pa Super 605, 610; 561 A2d 1257 (1989) lv gtd 523 Pa 647; 567 A2d 650 (1989), and State v Carufel, 112 R I 664, 668; 314 A2d 144 (1974).

Consequently, when the method of entry violates the knock-and-announce statute, the exclusionary rule may come into play if the Forth Amendment standard of reasonableness is also offended. See Kerr v California, 374 US 23, 47;83 S Ct 1623; 10 L Ed 2d 726 (1963). Because the primary purpose of the constitutional guarantee is to prevent unreasonable invasions, if a police officer has reasonable cause to

enter a dwelling to make an arrest, his entry and search are not unreasonable. Kerr, supra at 39 relying on People v Mattox, 46 Cal 2d 301, 306; 294 P2d 6 (1956). If the police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay, strict compliance with the statute may be excused. Similarly, if events indicate that compliance with the statutory requirements would be a useless gesture, the requirement that the police officers wait for admission may also be excused. Gonzalez, supra at 848.

For example, in People v Marinez, 160 Ill App 3d 349, 351; 513 NE2d 607 (1987), the court concluded that the information acquired by the police officers "was insufficient to supply the requisite exigent circumstances which would permit them to dispense with the knock-and-announce

rule." There was no proof that the evidence sought to be seized was kept in a place that would facilitate its destruction. Nor was there any indication that the occupant was armed. Without more, there was not justification for the conduct of the police.

In this case, we believe that the search and seizure was constitutionally invalid, not merely statutorily illegal. There is no claim that a search carried out in compliance with the statute would have resulted in the destruction of the evidence, increased the danger to the police officers, or have been a useless gesture. Under these circumstances, we can only conclude that the police officers acted unreasonably when they executed the search warrant. Because there was no evidence introduced at the suppression hearing to justify the

simultaneous forced entry of defendant's home, we can find no reason to excuse the police officers from complying with the requirements of our knock-and-announce statute.

With respect to the influence of the statutory remedy on our analysis, we do not agree that the existence of that remedy precludes application of the exclusionary rule. There can be dispute that evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule. Mapp v Ohio, 367 US 6431 81 SCt 1684; 6 L Ed 2d 1081 (1961).

Reversed.

/s/Mark J. Cavanagh

/s/Janet T. Neff

I concur in result only

/s/ William R. Beasley

APPENDIX "B"

MICHIGAN SUPREME COURT
ORDER Lansing, Michigan
Entered: January 22, 1992 92327

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 92327
COA: 133018
LC: 90-05321

DWAYNE EDWARD POLIDORI,

Defendant-Appellee.

On order of the Court, the Application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Sealed I, CORBIN R. DAVIS, Clerk

Dated: January 22, 1992

APPENDIX "C"

STATE OF MICHIGAN
IN THE RECORDER'S COURT FOR THE
CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

No: 90-5321

DWAYNE POLIDORI AND MARIE SNODGRASS,

Defendants.

OPINION

The Defendant Dwayne Polidori is charged with Possession with Intent to Deliver over 50 Grams but Less than 225 Grams of Cocaine. He has filed a Motion to Suppress Evidence and an evidentiary hearing was conducted. The court heard testimony from two members of the narcotics team, Officers Bredin and Baily, and the testimony of the Defendant's next-door neighbor, Helen Gribenaz. Based upon that testimony, the Defendant argues that the search and seizure violated the provisions of Section 780.656 MCLA and therefore must

be suppressed because of the per se exclusionary rule.

The Defendant is correct in his assertion that Section 780.656, the so-called "knock and announce" statute was violated. The officers testified they had obtained a search warrant, had gone to Defendant's home, knocked and announced their purpose and then waited three to six seconds before breaking down the door. Although the court believes their testimony, for the reasons stated at the hearing, the court also finds that the actions to which they testified were not sufficient to comply with the statute. Absent any exigent circumstances, three to six seconds was not substantial compliance. The court does not hold nor does it wish to imply that three to six seconds can never be substantial compliance. It only holds that under the facts of this case, it was not a sufficient period of time.

While granting that the execution of the search warrant was unlawful, in that the officers did not comply with the knock and announce statute, it does not necessarily follow that the per se exclusionary rule mandates that the fruits of the search be suppressed.

The exclusionary rule has a dual purpose: (1) protection of the right to privacy, and (2) deterrence of police misconduct. People v Warner, 401 Mich 186, 209 (1977) Birkenshaw v City of Detroit, 110 Mich App 500, 512 (1981). The right to privacy is not violated when a search warrant. Assuming, arguendo, that the search warrant in his case was valid at the time it was obtained, it was not invalidated by the manner in which it was executed. People v Wittler, 247 Mich 656 (1929). Since there was a valid search warrant, the search and seizure was not constitutionally invalid but rather it was

merely statutorily illegal. The exclusionary rule is only applicable to constitutionally defective searches and seizures, not to statutory violations. People v Livingston, 64 Mich App 247, 255 (1975). Birkenshaw v City of Detroit, supra.

The second purpose of the exclusionary misconduct, would not be adequately served by its application to this case. A statutory violation, especially where the statute provides its own remedy, does not require the application of the exclusionary rule. People v Moore, 180 Mich App 301 (1989). There is a remedy provided in MCL 780.657 for an officer who wilfully exceeds his authority. The statute provides in relevant part:

> **Penalty for wilfully exceeding authority**
>
> Sec. 7. Any person who in executing a search warrant, wilfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1000.00 or imprisoned not more than 1 year.

An officer who wilfully violates his authority, ie. violates the knock and announce statute, is subject to this type of penalty. The wilfullness necessary to violated this statute implies that the statute is designed to deter intentional conduct, not unintentional conduct is the best way to achieve deterrence of police misconduct Birkenshaw v City of Detroit, supra. Penalties such as the suppression of evidence for unintentional conduct not covered by MCL 780.657, will not deter police misconduct and thus are unnecessary. Therefore, the deterrent aim of the exclusionary rule would not be properly served by applying the rule to this case because if the officers failure to properly execute the warrant was wilful, there is a remedy available.

The Defendant's Motion is respectfully denied.

SIGNED

James N. Garber

Dated: August 23, 1990